

**IN THE COURT OF APPEALS OF IOWA**

No. 1-262 / 10-0996  
Filed June 15, 2011

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**RYAN KENT RICHARDS,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Black Hawk County, Jeffrey L. Harris, District Associate Judge.

Ryan Richards appeals from the judgment and sentence entered on his conviction of domestic abuse assault causing bodily injury. **REVERSED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Dustin Lies, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., Vaitheswaran, J., and Mahan, S.J.\* Tabor, J., takes no part.

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

**VOGEL, P.J.**

Ryan Richards appeals from the judgment and sentence entered on his conviction of domestic abuse assault causing bodily injury under Iowa Code section 708.2A(2)(b) (2009). Richards asserts the district court erred in (1) overruling his objections to hearsay evidence, and (2) finding the evidence sufficient to support his conviction. Alternatively, he asserts that if we find error was not preserved on the hearsay objections, then his counsel was ineffective.

**I. Background Facts and Proceedings**

On December 27, 2009, police were called to the home of Richards for self-inflicted cuts to his wrists. Also present when the police officers arrived was Amber Hayes, Richards's girlfriend, who had injuries to her face. Officer Tim Smith testified that Hayes told him Richards "threw me into the wall." Officer Gavin Carman confirmed Hayes made this statement, and testified that he observed a large hole in the wall.

Hayes initially testified she did not remember speaking to the officers on the night of the 27th, but later testified she had gone to Richards's house, found him sleeping, and upon trying to wake him, startled him such that he reacted by pushing her into a wall. She testified his actions were unintentional. However, when confronted with the officers' version of the incident, Hayes testified, "I told them exactly what happened, so whatever I told them is the truth, but I remember telling them it was not intentional. I know it was not an intentional thing."

Richards was charged with domestic abuse assault causing bodily injury and, following a jury trial, was convicted and sentenced to 365 days in jail. He appeals.

## II. Hearsay

Richards asserts the district court erred in admitting the testimony of the police officers concerning statements made by Hayes because the statements are hearsay. “Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Iowa R. Evid. 5.801. Hearsay is not admissible at trial unless an exception applies. *Id.* at 5.802. One recognized exception is a “recorded recollection”:

A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness’s memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

*Id.* at 5.803(5). We review hearsay rulings for errors at law. See *State v. Ross*, 573 N.W.2d 906, 910 (Iowa 1998).

The State first questioned Officer Smith:

Q: Okay. Did [Hayes] indicate how she received her injuries? A: Yes.

MR. GUERNSEY: Object, your honor. It’s calling for hearsay.

THE COURT: State?

MR. LIES: Well, your honor, I think there’s a couple bases. I think it’s prior recollection recorded. I think she said she didn’t recall what she told the officers, but what she told them was the truth. Also, I can lay some additional foundation for excited utterance.<sup>1</sup>

THE COURT: The objection is overruled.

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<sup>1</sup> The State concedes that although it indicated at trial that it could lay a foundation for admission of the evidence as an excited utterance, no such foundation was laid. The State does not assert on appeal that the statement was admissible as an excited utterance.

The State next questioned Officer Carman:

Q: And did you ask her how those injuries had occurred?

A: Yes.

Q: And do you recall her response? A: She pointed to a large hole in the wall.

Q: Okay. Were any follow-up questions asked? Did you get any idea about the circumstances of how that happened?

A: Yes.

Q: Can you tell me what she indicated to you? A: She had stated that her and Mr. Richards—

MR. GUERNSEY: Your honor, again, I'm going to impose the objection on hearsay.

THE COURT: Thank you. Same ruling. You may answer.

Richards asserts the testimonies of both Officer Smith and Officer Carman are hearsay, as the testimonies were offered to prove the truth of Hayes's prior statement that Richards caused her injuries. The State responds that while the statements of the police officers may have been hearsay, an exception under Iowa Rule of Evidence 5.803(5), "recorded recollection," applied. The State argues the record as a whole sufficiently established Hayes lacked sufficient recall, and because she adopted her statements made to the police, the exception applies.

While the court overruled the stated objection by Richards, under the recorded recollection exception, we find that exception inapplicable. On appeal, both Richards and the State agree that the statements of the police officers are hearsay, as they were offered to prove the truth of the matter asserted, that is, that Richards intentionally committed the injuries to Hayes. One of the requirements for hearsay to be admissible under the recorded recollection exception is that a record must be presented to a witness to refresh her memory of the event. See *State v. Thompson*, 397 N.W.2d 679, 683 (Iowa 1986)

(explaining that the rule seeks to assure that there has been an accurate recordation of a past recollection, reasonably contemporaneous with the event, to use as a substitute for the nonexistent present recollection of the event).

Richards and the State also agree no record was presented to Hayes at trial in order to refresh her recollection of statements made to the police. The State claims Hayes “adopted” the statements she made to the police, by stating at trial, “I told them exactly what happened, so whatever I told them is the truth.” Hayes’s testimony is not at issue, but rather it is the officers’ testimonies being challenged. We find the court erred in overruling Richards’s hearsay objections. See *id.* (explaining that the recollection recorded rule contains several requirements: (1) a witness must be shown to have had an incomplete recollection, (2) a showing that the witness’s recollection of events at the time of the recording was “fresh,” and (3) a satisfactory showing of the accuracy of the process utilized to record that recollection). The exception was wholly inapplicable to the officers’ testimonies as to what they asserted Hayes told them during their investigation.

Both Hayes and Richards testified that the incident was unintentional; through Hayes’s earlier statements, the officers provided the only evidence that Richards intentionally threw Hayes into the wall.<sup>2</sup> Therefore, the admission of this hearsay evidence was prejudicial to Richards and we must reverse the conviction and remand for a new trial. See Iowa R. Evid. 5.103(a) (“Error may

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<sup>2</sup> Both the State and Richards acknowledge the statements could have been admitted to impeach Hayes under Iowa Rule of Evidence 5.613. However, the statements were not admitted solely to impeach Hayes, but were the only substantive evidence at trial that Richards’s act was intentional.

not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. . . ."); see *State v. Horn*, 282 N.W.2d 717, 724 (Iowa 1979) ("The admission of hearsay evidence is presumed to be prejudicial error unless the contrary is affirmatively established."). Consequently, we need not address the remaining issues Richards has raised on appeal.

**REVERSED AND REMANDED.**